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Recovery Transparency Meets Mixed Results

Three weeks after President Barack Obama signed into law the $787 billion American Recovery and Reinvestment Act of 2009 (Recovery Act), states have begun to see federal economic stimulus funds move within their borders. Behind the hundreds of billions of dollars soon to follow are some 25 federal departments, agencies, and administrations that are in charge of allocating the funds. In addition to this unprecedented level of emergency spending is a pledge by Obama to "watch the taxpayers' money with more rigor and transparency than ever." The speed at which the administration and some federal agencies have moved is impressive, even as there has been uneven implementation of transparency efforts.

Spending data on Recovery.gov, the new website established to monitor how the Recovery Act is being implemented, is organized haphazardly. To find information on Medicaid disbursements, for example, one must comb through a list of press releases to find a link to that spending. The Recovery.gov website links to the Recovery Act legislative text and contains a breakdown of the act's spending provisions by spending area (e.g. health, transportation, tax cuts, etc.), but the website does not – perhaps cannot yet, given the short time frame of its implementation – contain a listing of all federal Recovery Act programs with their attendant funding levels and state allocations. This fact, however, is mitigated by information provided by federal agency Recovery Act websites – a list of which is available on Recovery.gov.

The emblem which the Administration will use to identify Recovery projects

When the Office of Management and Budget (OMB) issued guidelines to the federal agencies on Recovery Act spending, it mandated that they establish on their own websites a specific and easy-to-find area to detail Recovery Act spending. These Recovery Act sections of agency websites are all located by adding "/recovery" after the agency's web address. For example, the Department of Transportation's Recovery site is located at "www.dot.gov/recovery." The Recovery Act and subsequent instructions to create agency websites are only weeks old, but some agencies have moved adroitly and are providing organized, detailed information. Other agencies have not done so.

An example of an agency that is managing its Recovery Act site well is the Department of Housing and Urban Development (HUD). On the HUD Recovery Act site, one finds a list of Recovery Act programs and is able to click on each program to view a description of the program; the dollar amounts of total funding for that program; total funds allocated; total funds obligated; and total funds expended. Additionally, HUD provides downloadable spreadsheets that present the level of funding each state will receive from each HUD grant program.

The Health and Human Services (HHS) Recovery Act website, while aesthetically pleasing with useful maps, lacks organization; it requires the user to hunt for funding allocations and program descriptions. The Department of Agriculture (USDA) Recovery Act site, however, provides programmatic spending allocation detail, while linking to USDA sub-agency sites that provide almost no Recovery Act information whatsoever. As federal funds begin to be transferred to the states through grants or federal programs, the need for well-organized and informative agency websites is becoming apparent.

The OMB guidance also instructs agencies to produce and make available on Recovery.gov, from March 3 to May 12, weekly reports detailing "total appropriations, total obligations, and total expenditures as recorded in agency financial systems on a cumulative basis" and "[a] short bulleted list of the major actions taken to date and major planned actions." These reports are not yet available at Recovery.gov, but they are available at the agency websites. And, like

the establishment of agency Recovery Act websites, this requirement has met with uneven results.

Most agencies provide a downloadable spreadsheet with the information exactly as described in the OMB Guidance. Unfortunately, the guidance specifies that spending be reported by Treasury Account. The Treasury Account number, however, does not indicate to which program it belongs, leaving everyone but program budget specialists bewildered as to how agency Recovery Act funds are allocated. However, a few agencies, like HHS, provide a program description to match the Treasury Account in their spreadsheets. But some agencies, like the U.S. Environmental Protection Agency and USDA, do not, as of the time of this writing, provide the required weekly report.

The level of transparency envisioned by the administration is ambitious, and with a law that is barely three weeks old, missteps and less than one hundred percent compliance is to be expected. Tracking Recovery Act spending at the program level, however, is only one challenge the Obama administration faces when it comes to spending accountability. As Recovery Act funds are disbursed to the states through contractors and subcontractors (and grantees and subgrantees), a sophisticated system of data reporting gathering will be required. In an effort to assist the administration in developing such a system, the Coalition for an Accountable Recovery, co-chaired by OMB Watch and Good Jobs First, has put forth its recommendations for a Recovery Act data collection and reporting system in a memorandum, "Interim Recovery.gov Data Reporting Architecture." It is certain that a series of iterations will be necessary to refine such a model to achieve the transparency articulated by the Obama administration, and as such, the CAR coalition will continue to solicit feedback from stakeholders and the administration to that end.

Industry Secrecy Still Hindering Protection from Toxics

The excessive use of confidential business information claims is a major factor preventing the government from safe, effective management of thousands of industrial chemicals, according to several experts who recently presented their views to a congressional panel. The witnesses asserted that when information about potentially dangerous chemicals is labeled as trade secrets, government agencies and the public are denied the opportunity to evaluate the risks of chemicals and take action to protect public health and the environment.

The House Subcommittee on Commerce, Trade, and Consumer Protection recently held a hearing to review the Toxic Substances Control Act (TSCA), a 33-year-old law enforced by the U.S. Environmental Protection Agency (EPA). Under the law, the agency is supposed to review and manage the risks of chemicals in commerce in the United States. Companies that submit chemical information to the EPA are allowed to mark certain information as confidential business information (CBI). The EPA is not allowed to disclose CBI to the public or other levels of government.

In testimony before the subcommittee, John Stephenson of the Government Accountability Office (GAO) reported that TSCA's confidential business information provisions restrict foreign, state, and local governments, as well as the public at large, from better controlling the risks of potentially harmful chemicals.

According to the GAO, "EPA's ability to provide the public with information on chemical production and risk has been hindered by strict confidential business information provisions of TSCA." The undisclosed information is needed for various activities, including "developing contingency plans to alert emergency response personnel to the presence of highly toxic substances at manufacturing facilities."

The GAO testimony also drew attention to the EPA's inability to counter a company's claims of confidentiality. About 95 percent of premanufacture notices are submitted containing some information labeled "confidential." These notices contain basic health and safety information and are required before a company can manufacture a new chemical. EPA has no information on whether these confidentiality claims are warranted and few resources to investigate and challenge inappropriate claims. As a result, vital information is not disclosed.

EPA reported that it challenges only 14 confidentiality claims per year and that companies withdraw nearly all the challenged claims. Approximately 700 new chemicals are introduced into commerce each year.

Reforming the CBI provisions in TSCA has been a recommendation of the GAO and several public interest groups. Richard Denison, a senior scientist with the Environmental Defense Fund, criticized many aspects of the toxics law, including the excessive use of CBI claims. In his testimony before the House panel, Denison stated that EPA's weak capacity to challenge the extensive CBI claims "further exacerbat[es] the lack of transparency and accountability of its assessments."

In a recently published article, Denison cites cases where information indicating substantial risk from a chemical is submitted with the chemical's specific name, identifying number, and even the name of the company submitting the data, all labeled as confidential.

J. Clarence Davies, one of the original architects of TSCA and a senior advisor at the Woodrow Wilson International Center for Scholars, also criticized several aspects of the statute. The CBI provisions make TSCA "less conducive to state-federal cooperation than any other environmental statute," and "major impediments" to international cooperation.

Among the industry representatives providing testimony to the panel was the American Chemistry Council (ACC), a trade association representing 140 chemical companies. The president of the ACC stated that TSCA should be "modernized" because the public's confidence in federal chemicals management has been "challenged." The industry association offered tempered support for limited release of CBI to state, local, and foreign governments.

Many policymakers have long held that TSCA is inadequate to protect public health and the environment and needs significant strengthening. In a statement submitted for the hearing, Rep. Henry Waxman, chairman of the House Committee on Energy and Commerce, said that "for years, it has been clear that TSCA is not living up to its intent." Mr. Waxman cited the EPA's inability to ban asbestos, a notorious known carcinogen, as an example of the weakness of the statute.

EPA Administrator Lisa Jackson announced in a memo to EPA employees in January, "It is clear that we are not doing an adequate job of assessing and managing the risks of chemicals in consumer products, the workplace and the environment. It is now time to revise and strengthen EPA's chemicals management and risk assessment programs."

The ability to protect certain sensitive corporate information allows businesses to keep confidential research and development programs, new chemical formulations, and the specific economics of their operations – all crucial to maintaining competitiveness. Yet, as the GAO and EPA data attest, the amount of CBI is enormous, and the limits it places on the public's right to know hinder the EPA's ability to protect public health and the environment.

Superior uses of CBI exist. EPA's highly successful Toxics Release Inventory (TRI) program requires industry to substantiate up front any CBI claim and provides simple, common-sense limitations on CBI claims. An OMB Watch report, *A Citizen's Platform for Our Environmental Right-to-Know*, uses the TRI model for handling CBI to outline a CBI policy for TSCA and other statutes. This model has worked well in providing critical information to the public through TRI and has resulted in few confidentiality claims while fully protecting CBI.

Sunshine Illuminates More Bush-era OLC Memos

On March 2, the U.S. Department of Justice (DOJ) released a set of previously classified memoranda from the Office of Legal Counsel (OLC). OLC produced the documents for senior members of the George W. Bush administration. The release is yet another step in the Obama administration's implementation of its commitment to transparency.

In total, nine memoranda were released and were largely dated between 2001 and 2003. However, more secret memos exist; the American Civil Liberties Union (ACLU) has requested 41 classified OLC memos, including those released by DOJ under the Freedom of Information Act.

The OLC issues legal opinions at the request of the White House Counsel. These opinions effectively have the weight of law, as OLC's decisions are binding on executive branch agencies. When OLC memos are classified, agencies operate under what many transparency advocates have called "secret law," unknown to the public.

Generally, OLC memos address specific policy proposals, but in the years following the Sept. 11, 2001, terrorist attacks, they were used to address wider areas of law and amorphous

hypothetical scenarios. Crafted in an environment of fear and uncertainty, these memos gave President Bush broad legal authorization to wage a war on terrorism.

Some of the issues covered by the released memos included the president's authority over detainees, the use of military force against terrorism, military detention of U.S. citizens, and the power to transfer captured suspects to foreign custody.

In a March 2002 memo, for instance, the OLC argued that the president "appears to enjoy exclusive authority" on the issue of how to handle captured enemy soldiers because the power "is not reserved by the Constitution in whole or in part to any other branch of the government." Article I, Section 8 of the U.S. Constitution, however, gives Congress the power to "declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." The OLC dismissed this clause as pertaining to captured property only as distinct from captured persons.

An October 2001 memo serves as an eerie testament to the rights the government was willing to take away from citizens in exchange for the appearance of safety and security. The OLC stated that "the Fourth Amendment does not apply to domestic military operations designed to deter and prevent future terrorist attacks."

Also included in the release was an 11-page, Jan. 15, 2009, memo written by Steven Bradbury. As the Bush administration waned, Bradbury wrote that many of the memos authored between 2001 and 2003 "do not currently reflect, and have not for some years reflected, the views of OLC." Bradbury retracted the arguments used in the released memos, as well as others that are still classified, such as previous OLC opinions concerning Foreign Intelligence Surveillance Act (FISA) applicability.

In a footnote, Bradbury wrote that the memo "is [not] intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility." The inclusion of this statement is rather unusual, but it is likely due to an anticipated inquiry within the DOJ by the Office of Professional Responsibility. The report, currently in draft form, is apparently critical of the conduct of the three primary authors of the 2001-2003 OLC memoranda – John Yoo, Jay Bybee (now a federal appeals court judge), and Bradbury.

The memos appear to have been interpretations of existing law, not operational plans – their disclosure did not pose a threat to national security. Instead, it seems the Bush administration withheld the documents to avoid public controversy.

The release of the memos is a positive sign of transparency at DOJ amidst otherwise bleak prospects. The Obama administration committed itself to an "unprecedented level of openness," but the DOJ has been heavily criticized for pursuing the Bush administration's application of the state secrets privilege in a key case concerning extraordinary rendition. More recently, the DOJ also decided to pursue the same course as the Bush administration in the search for missing Bush administration e-mails. The Obama administration sought to dismiss

litigation over the e-mails, even though it recognizes that the restoration process for the e-mails is not complete.

Obama Turning Back Clock on Some Bush Midnight Rules

The Obama administration is taking action to reverse controversial regulations finalized in the closing days of the Bush administration, including one affecting endangered species and another limiting access to reproductive health services.

Public interest advocates are hailing the Obama administration's decisions to undo the Bush-era rules, which had been criticized on both substantive and procedural grounds.

Obama issued a memo March 3 calling for the review of a regulation that changed the way the federal government makes decisions about endangered species. Obama instructed the departments of Interior and Commerce (which published the regulation jointly) to review the regulation and "determine whether to undertake new rulemaking procedures."

The rule, published Dec. 16, 2008, allows federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting habitat managers and biological health experts responsible for species protection.

Previously, consultation had been required. Now, consultation is at the discretion of the agencies that make decisions on development. The rule went into effect Jan. 15.

In addition to calling for a review of the rule, Obama's memo instructs agencies to ignore the provision of the regulation that allows them to opt out of consultation, rendering that part of the Bush rule toothless. "I request the heads of all agencies to exercise their discretion, under the new regulation, to follow the prior longstanding consultation and concurrence practices," the memo says.

Janette Brimmer, an attorney for Earthjustice, which had sued to stop the rule, called the memo "a crucial and positive first step in reinstating protections for endangered species lost through last-minute actions by the Bush administration," adding, "We're heartened that President Obama intends to return wildlife biologists to their rightful role in determining protections for America's plants and animals."

In another move that may reverse one of Bush's so-called midnight regulations, the Department of Health and Human Services (HHS) has indicated it will revise a rule that gives health care providers the right to refuse to provide women with access to or information about reproductive health services, if the provider objects on moral or religious grounds. The rule went into effect Jan. 20.

"We applaud the Obama Administration for its proposal to rescind the provider refusal regulation that took effect on the final day of the Bush Administration," Debra Ness, President of the National Partnership for Women & Families, said in a statement.

Both the endangered species rule and the provider conscience rule are among those Bush midnight regulations that are controversial not only for their policy implications but for the process by which they were developed.

The Bush White House reviewed a draft of the proposed provider conscience regulation in only hours, a process usually measured in weeks or months. The proposal was published online by HHS later that same day. As a result, the Equal Employment Opportunity Commission, which enforces regulations prohibiting workplace discrimination on the basis of religion, was not adequately briefed, according to Rep. Henry Waxman (D-CA).

On the endangered species rule, public input was sacrificed. According to the final rule, the administration received approximately 235,000 comments on the proposal. The Associated Press reported that agency officials pressured staff to review all the comments in just one week. One calculation estimated the staff assigned to reviewing comments had to review seven comments per minute to meet the deadline.

The Bush administration pushed those rules and others through the usual rulemaking process in order to ensure they were not only final but in effect. By law, agencies must wait either 30 or 60 days after publication before implementing new regulations.

On Jan. 20, new White House Chief of Staff Rahm Emanuel issued a memo setting out the Obama administration's policy for dealing with other regulations left by the Bush administration. The memo asks agencies to "consider extending for 60 days the effective date" of those regulations that are final but not yet in effect.

For those rules that were both final and in effect, it now appears the Obama administration will adopt a rule-by-rule strategy to make any changes or withdrawals it deems necessary.

Work will remain for the Obama administration until new regulations replace the ones finalized under Bush. While Obama's endangered species memo effectively neuters the Bush-era provision that made consultation optional, it makes no mention of the rule's prohibition on considering the effect of global climate change on species survival. The provision, inserted in the late stages of the rulemaking process, restricts the federal government's ability to protect those species whose habitats are or will be affected by climate change.

Similarly, environmentalists praised Interior Secretary Ken Salazar's decision not to lease land in the West for oil shale development – an environmentally intrusive method of energy extraction, but the regulations that permit leasing, finalized in November 2008, remain on the books.

And while HHS has pledged to revise the provider conscience rule, details have yet to be released. The White House is currently reviewing the revision. Once published, it will be subject to a public comment period, according to *The Washington Post*. Meanwhile, the rule remains in effect.

Most of the Bush administration's other midnight regulations have gone unaddressed thus far. OMB Watch has identified 27 controversial regulations finalized between Oct. 1, 2008, and Jan. 20, 2009. Of those, the Obama administration has delayed the effective dates of three, pursuant to the Emanuel memo, and has taken other actions on the endangered species, provider conscience, and oil shale rules.

Experts Vie to Influence Obama on Regulatory Reform

Regulatory experts across the country are angling to change the way federal regulations are written and approved. Since President Barack Obama issued a memo Jan. 30 instructing his administration to rethink the executive order that governs the federal regulatory process, the White House Office of Management and Budget (OMB) has been accepting public comments on ideas for reform and meeting with stakeholders.

On Feb. 26, OMB announced the beginning of an 18-day comment period; OMB will accept comments until March 16. The public can submit comments by emailing them to oira_submission@omb.eop.gov or faxing them to (202) 395-7245. OMB is posting all comments online at www.reginfo.gov/public/jsp/EO/fedRegReview/fedRegReview.jsp. Obama has requested administration officials forward their recommendations to him by mid-May.

Obama's aim is to realign a rulemaking process many observers believe is outmoded. Modern risks like global climate change and the safety of the food supply are not being adequately managed, leaving many to question both the speed and seriousness with which the government can address emerging problems.

Obama is likely to substantially revise or completely replace Executive Order 12866, Regulatory Planning and Review. President Bill Clinton signed E.O. 12866 in September 1993. President George W. Bush made modifications to the E.O. but largely upheld the Clinton framework.

E.O. 12866 requires federal agencies to seek White House approval before publishing regulations. Agencies must submit to the White House Office of Information and Regulatory Affairs (OIRA), a unit within OMB, draft versions of proposed and final regulations. OIRA can require the agency to make changes to the rule before allowing it to move forward. OIRA also funnels the concerns or comments of other agencies inside the federal government.

E.O. 12866 also requires agencies to "assess all costs and benefits" of the regulatory options under consideration.

The process defined by E.O. 12866 has sometimes spawned controversy. For example, during the Bush administration, OIRA stalled for more than 18 months a regulation intended to protect the North Atlantic right whale, a critically endangered species. While under OIRA's control, officials from Vice President Dick Cheney's office and the Council of Economic Advisors questioned the scientific basis for the rule. When the Department of Commerce unveiled the final rule, it was weaker than the proposed version released years earlier.

Critics of the process are now weighing in with ideas for reform. OMB Watch called for an end to rule-by-rule review – a process that has dominated federal rulemaking under E.O. 12866 and its predecessor order. "White House offices do not, and should not, duplicate the expertise of the agencies and, therefore, should not be involved in the review of each significant regulatory proposal," OMB Watch said.

Instead, OIRA should show more deference to agencies. OIRA could continue to facilitate comments from other agencies, but its direct relationship with rulemaking agencies should help, not hinder, according to OMB Watch. OIRA should shift its responsibilities by helping agencies set priorities and identify areas where regulation could address an unmet need. OIRA should also hold agencies accountable for delays in finalizing rules, OMB Watch said.

Other commenters, including the Center for Progressive Reform (CPR), also called for an end to rule-by-rule review.

However, Jim Tozzi of the Center for Regulatory Effectiveness urged a continuation of rule-by-rule review: "OMB review of discretionary regulations should be viewed as indispensable to the President's Constitutional duty to 'take Care that the Laws be faithfully executed,' since rulemaking is in many instances the primary way in which most statutes are implemented."

Comments submitted by law professors Jacob Gersen and Anne Joseph O'Connell focused on the length of the rulemaking process. Using government-provided data, they found the average time between a rule's proposal date and finalization date to be 503.4 days for significant regulations. The calculation does not encompass the time it takes for an agency to study and develop its proposed rule.

Gersen and O'Connell recommend OIRA more frequently "encourage agencies to start and finish rulemakings more quickly."

Some commenters targeted cost-benefit analysis. CPR urged the Obama administration to forego the usual form of cost-benefit analysis, which has traditionally emphasized the conversion of all costs and all benefits to dollars and cents, for comparison's sake. CPR says the focus on so-called monetization leads to the "inability of cost-benefit analysis to measure the benefits produced by regulatory action."

Others called for changes to the way cost-benefit analysis is done. Reece Rushing from the Center for American Progress recommended cost and benefit assessments more accurately identify the parties that are expected to feel a rule's impact, rather than aggregating impacts

into a single cost estimate and a single benefit assessment. Matthew Adler from the University of Pennsylvania also discussed the distribution of costs and benefits and proposed innovative ways for measuring a rule's effect on income inequality or poverty.

Many commenters mentioned the need to improve transparency in the rulemaking process, especially during OIRA's review of rules, if it is to continue. Columbia University law professor Peter Strauss commented, "The legitimacy and acceptability of [OIRA's] role requires a high degree of transparency in its exercise – not just lists of meetings, attendees and submissions, but copies of documents." He added, "If agencies should change their course as a result of coordination activities, they should indicate how and why they were persuaded to do so."

OMB is also taking meetings with outside interests to hear recommendations in person. OMB has held at least three of these meetings, according to the webpage listing comments and meetings. OMB held one meeting with representatives from public interest groups, another with industry lobbyists, and a third with officials representing state and local governments.

(All comments and meeting participant lists are available at www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp.)

Outside of the OMB-led process for revising the executive order, the Obama administration is taking other steps to reform rulemaking. On March 9, Obama signed a presidential memorandum directing the White House Office of Science and Technology Policy (OSTP) to lead an effort to develop recommendations "designed to guarantee scientific integrity throughout the executive branch."

"The public must be able to trust the science and scientific process informing public policy decisions," Obama said in his scientific integrity memo. In an apparent affront to the Bush administration, he added, "Political officials should not suppress or alter scientific or technological findings and conclusions." Scientific integrity and transparency advocates repeatedly criticized the Bush administration for suppressing science around controversial issues, such as climate change and reproductive health.

Obama provided certain key principles that OSTP must follow in developing recommendations, including the importance of hiring agency scientists on the basis of expertise, not political ideology. Obama highlighted the need for transparency, saying, “Each agency should make available to the public the scientific or technical findings or conclusions considered or relied on in policy decisions,” except where prohibited by law. He added that each agency should also have procedures to “ensure the integrity of the scientific process” and ensure that decision making is not corrupted.

Nonprofits Make Major Impact on DC Voting Rights Legislation

Nonprofits have had an enormous impact on the District of Columbia House Voting Rights Act of 2009 (H.R.157/S.160). The bill passed in the Senate on Feb. 26 by a 61-37 vote and will soon

come before the House. If the bill passes and is signed into law, it will give the District of Columbia a voting member in the House of Representatives for the first time.

Currently, the District's congressional delegate, Eleanor Holmes Norton, can only vote in committee. As part of a compromise, the bill would also temporarily give Utah an additional House seat based on an undercount of Mormon missionaries who worked abroad in 2000. If the 2010 census does not support the new seat, it would possibly go to the state next in line to gain a House seat.

DC Vote, a 501(c)(3) organization that strives for full voting representation for the District of Columbia, has played a huge role in the legislation that passed the Senate. Due to its efforts, as well as local citizens and elected officials, the District is closer to a voting representative than it has been since a constitutional amendment that would have given the District a House representative and two senators passed Congress in 1978. This current effort, however, is considered a more substantial move toward voting rights because the constitutional amendment had no chance of being ratified by the states, and it died as a result.

DC Vote has used a variety of methods to further the goal of securing voting rights for the District. It has produced educational documents on the voting rights issue. It has also engaged in activities designed to educate the American public and legislators around the nation. Recently, DC Vote produced the "Demand the Vote" music video that was shown in February at the Our City Film Festival in Washington, DC. They also held a Veteran's Day Rally in November 2008 to urge support for DC voting rights. Thirteen nonprofits signed on as organizational sponsors, including Common Cause, Friends of the Earth, and Public Citizen.

The National Rifle Association (NRA), a 501(c)(4) organization, has also played a huge role in the bill content as of late, causing the House to put the legislation on hold and possibly derailing a bill that seemed certain to quickly pass through the House. The organization is currently lobbying House members to press for amendments that would overturn DC gun laws. The bill that passed in the Senate already contains gun amendments that weaken DC gun laws.

After the gun amendments were proposed in the Senate, DC Vote organized an effort to have the public call their senators and urge them to vote against the gun amendment. The group set up a toll-free number and provided a sample script to assist people who wanted to make calls. Voting rights advocates were hoping that the House would pass a version without the gun amendments and that the amendments would be omitted when the two chambers met to reconcile the different versions of the legislation.

"Supporters of the vote bill had assumed Democrats would use their majority power to pass a rule that would bar gun amendments," according to *The Washington Post*. However, the NRA is threatening to score any procedural vote Democrats bring to prohibit adding gun amendments to the bill. Scoring procedural votes is a highly unusual move. Normally, legislation is scored on its merits, not on procedural maneuvers. According to Norton (D-DC), “People don’t score rules, they score bills.”

The NRA's threat to score the rule is a big dilemma for some pro-gun rights Democrats from conservative states who do not want to be listed as casting an anti-gun vote. Norton recently told the DC Democratic State Committee that the Leadership Conference on Civil Rights (LCCR), a 501(c)(4) organization, told her that if the NRA scores the procedural maneuver as an anti-gun vote, then the LCCR will score it as a civil rights vote. This may neutralize the NRA's approach, as almost all of the pro-gun Democrats who are being targeted by the NRA have perfect scores on civil rights issues from the Leadership Conference, according to Norton. These legislators do not want to be seen as casting an anti-civil rights vote any more than they want to be seen casting an anti-gun vote.

House Majority Leader Steny Hoyer (D-MD) put the bill on hold on March 3 "after learning that the National Rifle Association was urging its members to use a procedural maneuver to press for amendments that would repeal many of the city's gun laws," according to *The Washington Post*.

Obama Administration Delays Implementation of Controversial USAID Rule

On Feb. 2, the Obama administration announced that it was delaying the implementation of the controversial Partner Vetting System (PVS) rule and opening a 30-day public comment period. The rule is now scheduled to go into effect on April 3.

The U.S. Agency for International Development (USAID) first introduced the proposed rule on the PVS in July 2007. An effort ensued to get the rule withdrawn, but despite objections from the nonprofit sector, USAID made the rule final on Jan. 2. However, the final rule said that it would be up to the incoming Obama administration to decide whether or not PVS would be implemented.

If implemented, PVS would require that all nonprofit groups that apply for USAID grants and contracts provide detailed information on "key individuals." The federal government would then check names and information against intelligence databases that contain data on terrorists.

According to the final rule, "The information collected for these individuals would be used to conduct screening to ensure USAID funds and USAID-funded activities are not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security."

Despite criticism from nonprofits that the program is burdensome, unwarranted, and dangerous for workers, the substance of the final rule remains largely unchanged. OMB Watch submitted comments in August 2007 and did so again on March 4, calling for the withdrawal of the rule. The comments note that USAID was unresponsive to previous public comments and reiterated some of the original concerns. Other issues OMB Watch addressed include:

- Lack of any evidence that PVS is needed
- Problems with due process
- Safety of aid workers
- Problems with list checking

USAID has insufficiently demonstrated that agency funding has gone to support terrorists or terrorist organizations. The Office of Inspector General (IG) issued a report on Dec. 10, 2007, in response to concerns that USAID provided funds to universities and students in Gaza that were allegedly linked to or controlled by Hamas. The IG found that although procedural violations occurred, none of these grants assisted a designated terrorist organization. The students and universities were vetted more than once, but USAID does not believe it should wait for evidence to implement a vetting system. According to the agency, "USAID does not believe that it should wait for hard proof that our funds are actually flowing to terrorists before implementing additional safeguards to its anti-terrorist financing program. Even the suggestion that our funds or resources are benefiting terrorists is harmful to U.S. foreign policy and U.S. national interests."

The PVS rule disregards the benefits of due diligence nonprofits already engage in that focus on knowing their grantees and knowing how resources are used. Organizations build trust with local communities to ensure that those they work with are not affiliated with terrorist groups. Many organizations already check names against the public list of Specially Designated Nationals and Blocked Persons maintained by the Department of the Treasury's Office of Foreign Assets Control (OFAC).

OMB Watch pointed out that some important details are absent in the final rule. "The assurances listed in the response to comments and background information are not binding, offering no real legal protection to grantees or individuals whose personal information may be submitted. And the final rule leaves many central details to be determined later," OMB Watch said. For example, if a group is denied a grant or contract, USAID will provide a reason and an opportunity for the organization to appeal administratively; however, this appeal process is not described in any way. The OMB Watch comments go on to say, "More information should be made available for comment regarding this appeal process before implementing PVS."

OMB Watch also reiterated the concern about the safety of aid workers and the value of organizations' neutrality, especially in areas of increased conflict. Local populations may consider collecting such information to be compromising the groups' independence, creating the perception that USAID grantees are instruments of the U.S. government, putting aid workers' lives at risk. The final rule overlooks these concerns and simply states that one of the purposes of the PVS is to enhance the safety of personnel.

In comments to USAID, InterAction, a coalition of U.S.-based international relief and development non-governmental organizations (NGOs), noted that "if U.S. NGOs are perceived to be working in concert with the law enforcement or intelligence agencies of the U.S. or a foreign government (friendly or hostile), the risk of violence, which is already significant in some contexts, can only increase." InterAction continued, "Either consequence will likely cause

U.S. NGOs to scale back or end programs in countries where the local populations may not have a favorable opinion of the U.S. Government. Given the role that U.S. NGOs play in showing the best face of America to the world, and the fact that humanitarian and development programs mitigate the poverty and hopelessness that contribute to the violence and extremism that leads to terrorism, such a scaling back of programs is not in the U.S. interest."

Parts of PVS are exempt from the Privacy Act, which governs record keeping by federal agencies. On July 20, 2007, USAID published the proposed rule in the *Federal Register*, exempting portions of PVS from sections of the Privacy Act. During the initial 60-day comment period, USAID received more than 175 comments on these exemptions. InterAction wrote in its comments, "The Privacy Act provides exemptions from its procedures for law-enforcement agencies if and when the use of the information is considered 'routine use.' USAID is not a law enforcement agency, and USAID sharing the collected information with unnamed third parties for investigative purposes is not a 'routine use' within the scope of USAID's mission, as the purpose of the information collection is purportedly to allow USAID to meet its own compliance requirements with law enforcement and counterterrorism mandates. The law enforcement and 'routine use' exemptions, therefore, do not apply to the Rule."

The International Center for Not-for-Profit Law (ICNL) made another interesting distinction in comparing the vetting of individuals associated with charities and those directly receiving government bailout funding. "Other parts of the US Government ('USG') expend significantly greater amounts of taxpayer money than USAID," said ICNL. "As but one example, the amount of taxpayer funding allocated to the 'bailout' of the automobile industry is many times USAID's entire operating budget. We suspect, however, that the officers, directors, and 'key individuals' of automakers and their subcontractors (foreign or domestic) were not required to submit their social security numbers to the USG so they could be vetted against terrorism lists before receiving taxpayer funding."

ICNL also made an important note about the role of USAID: "Countries around the world are monitoring the USG's approach to the regulation of NGOs, seeking precedential support for implementing their own restrictive measures against civil society. In a number of countries, these restrictions take the form of intrusive reporting requirements justified in terms of counter-terrorism objectives. As the lead development agency dependent on NGOs to achieve a host of developmental objectives, it is important that USAID follow Secretary Clinton's advice to 'lead by example' on this critical issue."

Even if the PVS rule is not implemented, the program could come back in another form. A bill has been introduced in the House with almost the exact language as the regulation. On Feb. 13, Rep. Ileana Ros-Lehtinen (R-FL) introduced H.R. 1062, the United States Foreign Assistance Partner Vetting System Act of 2009, which would mandate the PVS. However, unlike the USAID rule, the bill includes a detailed appeals process for grantees. The bill has been referred to the House Foreign Affairs committee, where Ros-Lehtinen is the ranking member.

GAO Reports on Nonprofit Funding through Sub-Award Contracts

A recent report to the chairman of the House Budget Committee shows that the federal government relies on networks and partnerships to achieve its goals, and many of these involve nonprofit organizations. The Government Accountability Office (GAO), the investigative arm of Congress, produced the report.

Rep. John Spratt (D-SC), the budget committee chairman, asked GAO to assess (1) the mechanisms through which federal dollars flow to nonprofits and (2) what is known about federal dollars flowing through government programs to nonprofit organizations in Fiscal Year 2006. To address these objectives, GAO conducted a literature review of funding; analyzed data from several sources, including the Federal Procurement Data System (FPDS) and the Federal Assistance Awards Data System (FAADS); and analyzed nonprofit organizations' roles in 19 federal programs.

GAO found that the federal government uses a variety of funding mechanisms to achieve national priorities through partnerships with nonprofit organizations, and the relationships are sometimes complex and multidirectional. Nonprofit organizations receive federal grant and contract funds both directly and through other entities for performing activities or providing services to particular beneficiaries. Federal grants and contracts may also reach nonprofit organizations by passing through intermediary levels of government, particularly grant funds provided to states or cities that then disburse those funds to nonprofit organizations. Federal funds paid to nonprofit organizations as "fee for service" contracts follow a more complex path, as exemplified by federal health insurance programs that reimburse nonprofit organizations for services they provide to individuals.

Federal loans facilitate nonprofit organizations' access to capital; for example, they finance the construction of systems to improve electric service in rural areas. Other mechanisms, such as loan guarantees, while not directly providing federal funds to nonprofit organizations, increase access to other sources of funds.

For instance, student loans, while provided to individual students, often make funds available that result in revenues to nonprofit colleges and universities. Similarly, some tax policies (known as "tax expenditures") result in benefits to some nonprofit organizations by either reducing their costs or increasing revenues. Some nonprofits may be able to borrow funds at lower interest rates because of access to tax-exempt bond financing or may receive more contributions because the tax code provides an incentive for taxpayers to give.

Each of these mechanisms provides the federal government with differing levels of influence and oversight over nonprofit selection, performance, and accountability. With direct federal grants and contracts, and with some loans and loan guarantees, federal agencies generally select the nonprofit recipient, directly control the amount of funding provided, and generally monitor nonprofit performance. With other mechanisms, such as tax expenditures and fee-for-

service programs, the federal government sets criteria for acceptable recipients but does not directly select or monitor nonprofit performance.

GAO's analysis of the FY 2006 data on federal funding to nonprofit organizations indicates that grants were directly provided to nonprofits under roughly 700 different programs. Types of activities funded through direct grants to nonprofit organizations included social services and research. For example:

- The National Institutes of Health provides grants for extramural research to accomplish its mission related to public health needs. About 84 percent of its budget in Fiscal Year 2007 supported extramural research by researchers at various institutions, including nonprofit colleges and universities, research institutes, and hospitals.

- The Administration for Children and Families in the Department of Health and Human Services provides Head Start grants to nonprofit, as well as for-profit, entities. Public and private nonprofits can receive direct grants to provide educational, health, nutritional, and other services to low-income children and families.

- The Senior Community Service Employment Program, funded by the Department of Labor's Employment and Training Administration, provides grants to nonprofit organizations to provide subsidized, part-time work-based training to older workers through employment in the community service sector. Under this program, nonprofit organizations can also be beneficiaries of this subsidized labor.

Federal agencies also contract directly with nonprofit organizations to provide goods or services for the direct benefit of the federal government. Contracts are tracked in FPDS, which GAO found to be somewhat unreliable in categorizing entities as nonprofit, although suitable for providing some order of magnitude.

Due to limitations and reliability concerns with tracking systems, the data presently collected provide an incomplete and unreliable picture of the federal government's funds reaching the nonprofit sector through various mechanisms, although they suggest these funds were significant in FY 2006. Funding data sources identified the following as approximate amounts of federal funds provided to nonprofits in 2006 under different mechanisms (most sources did not reliably classify nonprofit status of recipients):

- $135 billion in fee-for-service payments under Medicare
- $10 billion in other types of fee-for-service payments
- $25 billion in grants paid directly to nonprofits
- $10 billion paid directly to nonprofits for contracts
- $55 billion in federal funds paid to nonprofits by states from two grant programs, including Medicaid

GAO could not assess other programs.

In addition, approximately $2.5 billion in loan guarantees and $450 million in loans were issued to nonprofits, and approximately $50 billion in federal tax revenues were foregone due to tax expenditures related to nonprofits.

No central source tracks federal funds passed through to an initial recipient, such as a state, and the nonprofit status of recipients was not reliably identified in FPDS or FAADS.

Factors contributing to data limitations include the nonprofit status of recipients being self-reported and no consistent definition of "nonprofit" across data systems. The development of a system to report funding through sub-awards, currently underway, may enable more complete estimates of funding to the sector in the future. However, until the definition of nonprofit status is improved, accurately determining the extent of federal funds reaching the sector is not possible, leaving policymakers without a clear understanding of the extent of funding to, and importance of, key partners in delivering federal programs and services.

To ensure that accurate information on federal funding provided to nonprofit entities is available, GAO recommended that the Office of Management and Budget (OMB), which is responsible for the tracking website USAspending.gov, ensure that its funding information is categorized with a consistent definition of nonprofit organizations. OMB commented that while GAO's recommendation would likely ensure more consistent data, it could be burdensome for states tracking sub-award data. As USAspending.gov is expanded and enhanced, GAO believes this is an opportune time to explore ways to improve the reliability of sub-award data.

OMB also said that using the Central Contractor Registration (a database used to support registration for procurement awards that is now being expanded to include grants and other forms of financial assistance) would likely offer a consistent way to validate IRS tax-exempt status. It noted, however, that this could also increase the resource burden on states.

Foundation Watchdog Releases Report on Enhancing Impact of Philanthropy

The National Committee for Responsive Philanthropy (NCRP), a national foundation watchdog organization, recently released a report titled *Criteria for Philanthropy at its Best: Benchmarks to Assess and Enhance Grantmaker Impact*. The report sets forth four criteria and ten accompanying benchmarks to act as recommendations on how grantmakers should improve their giving and management.

NCRP developed the criteria after "rigorous research, literature reviews, original data analysis and robust debates among some 50 people over 15 months." The criteria are intended to serve as a way for foundations to have the utmost impact on society, with a set of measurable guidelines that funders can use.

Criteria for Philanthropy at Its Best focuses on four criteria; values, effectiveness, ethics, and commitment. Each area has its own set of benchmarks on issues such as payout for grants, general operating support, board composition, advocacy, disclosure, mission investing, and support for underserved communities. The NCRP press release states that the report "is the first ever set of measurable guidelines that foundations and other institutional grantmakers can use to maximize their contributions to society and to make a positive difference in the world today."

The benchmarks include recommendations such as providing 50 percent of grant dollars for general operating support, 25 percent to support advocacy efforts, 25 percent of assets in investments related to the foundation's mission, and disbursing a total of six percent of assets in grants each year.

The benchmark calling for 25 percent of grant dollars to go to advocacy, organizing, and civic engagement is reassuring to a wide variety of nonprofit advocacy organizations. The benchmark's language is strong and direct: "Advocacy and policy work are integral to the country's nonprofits' role of providing a 'voice to the voiceless,' making this work all the more resonant for many institutional grantmakers that seek to impact the structures and systems that can move American society closer to equality of achievement."

In addition, the discussion of advocacy seems to be interchanged with social justice. The authors define social justice philanthropy as "the practice of making contributions to nonprofit organizations that work for structural change and increase the opportunity of those who are less well off politically, economically and socially." However, many causes that groups advocate for do not fit into this description.

Another benchmark, under the "Values" criteria, encourages foundations to provide at least 50 percent of their grant dollars to benefit lower-income communities, communities of color, and other marginalized groups, broadly defined. NCRP defines "marginalized or vulnerable" as groups including "economically disadvantaged, racial or ethnic minorities, women and girls, people with AIDS, people with disabilities, aging, elderly, and senior citizens, immigrants and refugees, crime/abuse victims, offenders and ex-offenders, single parents, and LGBTQ citizens." Thirteen percent of the foundations NCRP examined meet this benchmark.

It is this benchmark that has caused the most controversy. While many see it as necessary and valuable to support underserved communities, especially at a time of economic hardship, they also worry about setting such mandates for all of philanthropy. Many are also concerned about the independence of the sector and the ability of foundations to support issues they care about.

For example, the Council on Foundations has not endorsed the criteria, and president Steve Gunderson issued a press statement regarding the report. "While the Council on Foundations shares NCRP's goal of building a strong sector, we reject the use of a single template to promote effective philanthropy," said Gunderson. "Each foundation is different in its structure, mission, place of work, and pursuit of goals."

Paul Brest, president of the William and Flora Hewlett Foundation, was also critical and wrote an article in the *Huffington Post* to express his frustrations. Brest noted, "Even for someone who shares NCRP's concerns about marginalized communities, its hierarchy of ends is breathtakingly arrogant."

The last three areas of criteria and their benchmarks include:

Effectiveness

- Provides at least 50 percent of its grant dollars for general operating support
- Provides at least 50 percent of its grant dollars as multi-year grants
- Ensures that the time to apply for and report on the grant is commensurate with grant size

Ethics

- Maintains an engaged board of at least five people who include among them a diversity of perspectives – including of the communities it serves – and who serve without compensation
- Maintains policies and practices that support ethical behavior
- Discloses information freely

Commitment

- Pays out at least six percent of its assets annually in grants
- Invests at least 25 percent of its assets in ways that support its mission

Rep. Xavier Becerra (D-CA), a member of the House Ways and Means Committee, supports the recommendations. Becerra said the criteria will help members of Congress examine how foundations are performing, and some members may call for hearings to explore how foundations are spending their money.

NCRP executive director Aaron Dorfman said that the organization is not seeking greater regulation of foundations but will be sending the report to lawmakers. He added that the criteria are meant to start a discussion and to provoke debate. NCRP will also soon have available an online a self-assessment for foundations to use.